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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD LANE BANGERT AND
ALAN HAROLD KANDEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BELL, HARRIS, KIRKSEY & THOMAS
ALLEN I. HARRIS
3920 Lindell
St. Louis, Missouri 63108
(314) 533-1776
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Under the specific facts of the instant cause were the identification procedures used, to wit a photo array, unduly suggestive, and did such procedure taint any and all subsequent identifications so as to render the identification of Defendant, Bangert, constitutionally infirm?

2. Was there sufficient evidence as to the element of knowledge on the part of the defendant, Kandle, so as to convict him of the offense of "Knowingly Destroying Government Property?"

TABLE OF CONTENTS

	Page
Questions Presented	i
Introduction	1
Opinion Attached	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of Fact	3
Reasons For Granting Certiorari:	
I. That The Identification Procedures Used By The Government Were Impermissibly Suggestive And The District Court Erred In Permitting The Witnesses To Identify The Defendant, Bangert, Because Said Identification Was Tainted By The Original Improper Identification.	5
II. The Evidence Was Insufficient To Establish The Defendant's, And Especially The Defendant, Kandle's, Knowledge Which Was An Element Of The Instant Crime.	11
Conclusion	14
Appendix A - Opinion of Court of Appeals	A-1

TABLE OF AUTHORITIES

Cases:

Cooper v. Picard, 316 F. Supp. 865 (U.S. District Court for Massachusetts, 1979) 8,9

Manson v. Brathwaite, 97 S.Ct. 2243, 432 U.S. 98, 53 L.Ed. 2d 140 (1977) 7

Neil v. Biggers, 93 S.Ct. 375, 409 U.S. 188, 34 L.Ed. 2d 401 (1972) 7

Simmons v. United States, 88 S.Ct. 967, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968) 6,8

State v. Barbar, 42 F.2d 517 (3rd Cir., 1971) 5

U.S. v. Alden, 576 F.2d 772 (8th Cir., 1978) 7

United States v. Bangert and Kandle, ____ F.2d ____ Eighth Circuit, April 1, 1981 1

U.S. v. Gambrell, 449 F.2d 1148 (Dist. of Columbia Cir., 1971) 9

U.S. v. Johnson, 452 F.2d 1363 (Dist. of Columbia Cir., 1971) 9

U.S. v. Ranciglio, 429 F.2d 228, cert. denied, 91 S.Ct. 358, 400 U.S. 959, 27 L.Ed. 2d 268 (8th Cir., 1970) 10

U.S. v. Wade, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed. 2d 1149 (1967) 7

U.S. v. Workman, 470 F.2d 151 (4th Cir., 1972) 8

Statutes:

18 U.S.C. §641 2

18 U.S.C. §1361 3

28 U.S.C. §1254 2

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INTRODUCTION

The Petitioners, Richard Lane Bangert and Alan Harold Kandle, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on or about April 1, 1981, rehearing denied May 11, 1981.

OPINION ATTACHED

The opinion of the Court of Appeals is reported it appears as *United States* v. *Bangert and Kandle,* ____ F2d ____ Eighth Circuit April 1, 1981, and is attached herewith and made Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1981, re-hearing was denied May 11, 1981, and a mandate issued on May 21, 1981. On May 26, 1981, the district court granted a stay of execution of sentence pending application for Writ of Certiorari to the United States Supreme Court. Jurisdiction of this court is invoked under 28 USC 1254 Paragraph 1. These Petitioners ask that this Petition be considered by the court upon its merits since no prejudice can occur to the government by the presentation thereof and that the petitioner presents significant issues of importance in the law.

CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitutional Amendment Five:

> No person shall be...deprived of life, liberty or property without due process of law;...

Title 18 U.S. Code Section 641:

> Whoever, embezzles, steals, purloins or knowlingly converts to his own use or to the use of another, or without authority, sells, conveys, or disposes of any records, voucher, money, or thing of value of the United States or of any department or agency thereof, or of any property made or being made under contract for the United States or any department or agency thereof; or
>
> whoever receives, conceals, or retains the same with the intent to convert it to his own use or gain, knowing it to have been embezzeled, stolen, purloined, or converted-
>
> shall be fined not more than $10,000 or imprisoned for not more than 10 years or both; but if the value of such property does not exceed the sum of $100 he shall be fined

no more than $1,000 or imprisoned no more than one year or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S. Code Annotated 1361:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or of any property which has been or is being manufactured or constructed for the United States, or of any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment by not more than 10 years, or both; if the damage to such property does not exceed the sum of $100 by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

STATEMENT OF FACT

On November 27, 1979, about three weeks after the seizure of the U. S. Embassy and hostages in Iran a flag was stolen by three White males from a flagpole in front of the Federal office building at 1500 Market Street, St. Louis, Missouri. This flag was replaced by a large pink banner proclaiming "U.S.—KEEP YOUR BLOODY HANDS OFF IRAN." Two witnesses, Roland Reeves and Michelle Owens, observed the flag coming down and a third witness, John McHale, observed an individual running through the parking lot behind the building with a bulging black trash bag. These witnesses observed a stranger from varying distances for a period of time ranging from a few seconds to approximately three minutes. The witnesses could describe only one of the thieves. This first incident occurred ap-

proximately three minutes. The witnesses could describe only one of the thieves. This first incident occurred approximately 7:50 a.m.

Thereafter, at approximately noon or shortly before a demonstration was held at Washington University. After considerable speech making and a struggle over a different flag, an unknown individual pulled a flag out of a black plastic bag. Richard Bangert held one end of the flag and Alan Kandle spilled lighter fluid over the flag and ignited the same.

Both of the defendants testified and stated that there had been a planned demonstration and the burning of the flag was to be a part of the demonstration. They further testified they brought a flag for this purpose, but during the demonstration someone pulled out a different flag and it was the second flag which was destroyed. Both defendants also stated that they had read a press release which stated that a flag had been lowered at the Federal Building but that there was no indication that this flag was the second flag which was at the scene at that day.

After the demonstration Special Agent Julian Stackhaus of the Federal Bureau of Investigation interviewed the three above mentioned witnesses of the incident at the Federal Building and after having been given a description of one of the men, showed a photo array to the witnesses (Exhibits 3-A through 3-K) which contained eleven individuals of varying descriptions. Only the defendant, Bangert, having a fully beard. All three witnesses identified Exhibit 3-B, the photograph of the defendant, Bangert, as the man they saw at the Federal Building. Later, at the trial itself, the witnesses once more pointed out Bangert as being the man they saw but in the courtroom, as in the photo array, Mr. Bangert was the only individual who had a beard.

Upon a finding of Guilty to both charges, Mr. Bangert was sentenced to 6 months and $1000.00 on Court I, and 1 year and $1000.00 on Count II, these charges to run consecutively. Mr. Kandle was sentenced to 1 year and $1000.00 on Count II.

REASONS FOR GRANTING CERTIORARI

I. That The Identification Procedures Used By The Government Were Impermissibly Suggestive And The District Court Erred In Permitting The Witnesses To Identify The Defendant, Bangert, Because Said Identification Was Tainted By The Original Improper Identification.

One of the main issues in any criminal case is the identity of the perpetrator of the crime as the defendant. This identification must of necessity be based upon perception and memory of the witnesses. The nebulous factors can be manipulated, either innocently or intentionally by the psychological set by which this identification is made. Where this psychological set is so suggestive as to create the strong possibility of mistaken identification, it violates the basic tenants of due process. As pointed out in *State* v. *Barbar,* 42 F2d 517 (3rd Cir., 1971), "the major cause of wrongful convictions is not the use of confessions, but the use of eyewitness identification."

In the instant case, the Government produced three eyewitnesses to the theft alleged in Count I. John McHale stated he saw one individual. Roland Reeves and Michelle Owens both stated they observed three White males, but could only describe one. The descriptions given to the FBI on the date of the theft and immediately thereafter were as follows:

ROLAND REEVES: White male between 5'9" and 5'10" in height, medium build, receding hairline, wearing glasses, full beard and short length coat.

JOHN MCHALE: White male 5'8" tall, full beard, high forehead, curly hair, wearing a green jacket with blue pants and rubber sole shoes.

MICHELLE OWENS: White male with beard.

Therefore, at the time the photo array was shown to the witnesses the FBI already had a description of the only person

who was at all identifiable. However, at this point, rather than relying on witness description and trying to put together a photo array of similarly described individuals, Agent Stackhaus presented the witnesses with a series of eleven pictures in which the defendant, Bangert, stuck out like a sore thumb. In this photo array there were either two or three women, although Stackhaus had previously been told he was looking for three males. There were two Blacks, although witnesses had already stated the men they were looking for were White and there were six White males, four who were devoid of any hair whatsoever upon their chins, although a full beard was the major item of identification which all the witnesses agreed upon. Of the two witnesses, whose photos contained beards, one, later identified as Sam Schor had what was variously described as a "goatee," "van dyke" or "fu man chu beard" or a beard which framed the chin but left the cheeks bare. Only Richard Bangert's picutre contained a full beard such as that described by the witnesses. In view of this pinpointing of the defendant, by a group expecting to see a photo of the perpetrator of the crime, one can bearly imagine a more suggestive array. Even the Court of Appeals in Page 17 of their opinion state,

> "...this display of photographs may have been suggestive. And we do not condone the use of a display containing a section of photographs such as those used in this case..."

Later in the trial of the case, although the courtroom was packed, the Defendant, Bangert, was the only one in the courtroom who wore a beard.

In *Simmons* v. *The United States,* 88 S.Ct. 967, 390 U.S. 377, 19 L.Ed.2d. 1247 (1968), this court held that "convictions based on eyewitness identification at a trial following a pre-trial identification by photos will be set aside...if the photographic identification procedure was so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification." The test of the reliability of the identification procedures

was further expounded upon by this court in *Neil* v. *Biggers*, 93 S.Ct. 375, 409 U.S. 188, 34 L.Ed.2d 401 (1972); and *Manson* v. *Brathwaite*, 97 S.Ct. 2243, 432 U.S. 98, 53 L.Ed.2d 140 (1977).

In *U. S.* v. *Alden*, 576 F2d 772 (8th Cir., 1978), the test was stated was follows:

> "A criminal conviction is unfairly wrought if based on identification evidence resulting from pretrial confrontation which is so impermissibly suggestive as to create a very substantial likelihood of misidentification...the determination of whether identification evidence should be suppressed must be based on all the circumstances and should focus on (1) the degree to which the pretrial confrontation was suggestive (2) any exigencies justifying the suggestive procedure (3) the reliability of the identification"

In determining the factors of the suggestiveness of the identification, the court is required to look to the "totality of the circumstances". Some of the items which must be looked to were pointed out in the landmark case of *U. S.* v. *Wade*, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed.2d 1149 (1967), which listed (1) "the prior opportunity to observe the alleged criminal act," (2) "the existence of any discrepancy betweeen the pre-lineup description and the defendant's actual description," (3) "any identification prior to the lineup by another person," (4) "failure to identify the defendant on a prior occasion," (5) "the lapse of time between the alleged act and the lineup identification."

As to the first of these items, the claimed time of observation varied between a few seconds to an interrupted period of a few minutes. Although the lighting was good it is noteworthy to observe that although Owens and Reeves stated they observed three White males, they could give no description whatsoever of two of them. As to second of the items listed in *Alden*, it is interesting to note that the clothing dsecriptions were entirely different, both between the witnesses and between the testimony

one witness had given the FBI and later testimony at time of trial. Further the descriptions given were of a man of average height and average weight, with a full beard. Two of the witnesses elaborating this to include a receding hairline. The only distinguishing feature was the beard and yet in none of the identification procedures utilized was the Defendant, Bangert, ever compared with anyone else having a full beard.

Because of this suggestiveness, although the witnesses were faced with eleven pictures, this was in fact, no better than one—a practice which has been greatly condemned. In *U. S.* v. *Simmons, supra,* this court especially cautioned that the danger of misidentification "will be increased if the police display to the witnesses only the pictures of a single individual who greatly resembles the person he saw..." In *U. S.* v. *Workman,* 470 F2d 151 (4th Cir., 1972), the court voided a photographic identification procedure where only one photograph was shown and stated, "preparation of a photograph spread containing pictures of different people is a minor burden for the investigator when measured against potential prejudice to the accused." In *Cooper* v. *Picard,* 316 F. Supp. 856 (U. S. District Court for Massachusetts, 1979) the defendant was displayed to the witnesses in an unshaved condition and messy clothing. All of the others in the lineup were clean shaven police officers, all wearing ties and some in jackets. The court stated as follows: "in suggestiveness, this situation can hardly be differentiated from the showing of Cooper alone there was no emergency or other special conditions which made it necessary for Cooper to be viewed alone or to be viewed immediately before a lineup could be arranged."

In the immediate case, in the motion proceedings and also in the trial itself, the honorable District Court found that the identification of Mr. Bangert was free of any taint by the former photo grouping which the witnesses were shown. This ruling was based in part on statements of the witnesses themselves when asked leading questions as to the source of their identifica-

and illuminate the defendant's photo from amidst the rest. In *U. S.* v. *Ranciglio,* 429 F2d 228, *Cert. denied,* 91 S.Ct. 358, 400 U. S. 959, 27 L.Ed.2d 268 (8th Cir., 1970) the court stated:

> "The government has the burden in this case of establishing by clear and convincing evidence that the in-court identification was not based on the lineup identification. The proper standard is taken from *Wong Sun* v. *United States* and set out in *United States* v. *Wade*...and is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

The government in this case, through their use of female, Black, and clean shaven photographs, so isolated the picture of the defendant, the only one with a full beard which had been received in description as to poison the pretrial identification procedures and further the government in this case has not met their burden by establishing by "clear and convincing evidence" that this taint did not continue on into the actual trial proceeding.

WHEREFORE, for the reasons stated herein, appellant, Bangert, would request this court to make and enter an order setting aside Count I of his conviction and remanding this case for new trial without the use of the identification testimony of the three witnesses.

II. The Evidence Was Insufficient To Establish The Defendant's, And Especially The Defendant, Kandle's, Knowledge Which Was An Element Of The Instant Crime.

In Count II of the indictment the defendants were charged with the specific crimes of Destruction of Government Property valued at less than $100. There is a specific crime of Desecration of a flag. The government intentionally chose not to pursue that offense and charged the defendants rather with Destruction of Government Property under a general statute which required the government to prove the following elements: (1) that the property was owned by the United States Government and (2) that the defendants kenw at the time of the destruction that this was in fact government property.

As to Defendant, Bangert, if he was in fact was the one who stole the flag, he would be hard pressed to deny that he knew it belonged to the government, but if he was mistakenly identified through the highly suggestive lineup procedure as described in Section I of this argument, the logic below would apply equally to him as it does to the Defendant, Kandle.

It is axiomatic that knowledge may be inferred through behavior; yet, unless this behavior is such that is requires the prior knowledge, this is only one factor and can be over ridden by the other factors present. In the instant case, the demonstration at Washington University was planned behavior which the end result was to have been something highly similar to but different from that which was actually done. There is no question under the evidence presented but that another flag was brought to the scene for burning. The second flag appears in the testimony of government witness, Schucart and in several of the photographs. While it is recognizably smaller, it appears prominently throughout. It is also undisputable that the person who produced the flag that was later burned from the plastic bag at the demonstration was neither one of the defendants.

The government in closing argument quite vigorously tried to put words in Defendant, Kandle's, mouth and stated he testified he knew the flag burned was a governmental flag because of its size (314, 332). The defendant's actual statement was as follows:

Q: And is it still your testimony that the flag was that size and you did not realize that it was a government flag.

A: I had no way of realizing it.

Q: Have you ever seen a flag like that.

A: If that's the size of the flag in a federal building, I'm sure I have because I have passed the federal building before, but I didn't know that that was a government flag. (Tr. 290).

Government's Exhibit 6 and 13 were massive flags yet no larger than those on the walls of auditoriums behind speakers. Just because something is big does not mean that it is government property. The argument of size is a spurious argument and should be given only minimum weight.

Both the defendants admitted that they had read a press release distributed by an organization known as the Viet Nam Veterans Against the War. But the mere fact that they might gain knowledge of a theft through this means does not give them knowledge of the ownership of the flag which was brought out of the bag. The demonstration, though peaceful, was hectic and chaotic. Things were happening instantly and there was not time for an individual to carefully weigh and think that the flag mysteriously appearing might be the government's flag. About 20 minutes prior to the burning of the flag, Appellant Kandle made a statement. The government tried to infer that this was a press release discussing the theft which was issued by the organization, Viet Nam Veterans Against the War. However, it should be noted that Kandle specifically denied that he read that particular press release and further it seems improbable that one

who is not a member should be a spokesman for an organization when various members of the organization were present.

Evidence indicated that a flag which was brought for the burning was clean; however, the other flag appeared to be discolored as if soaked in some type of inflamatory material. Appellant, Kandle, is alleged to have poured lighter fluid over the flag immediately before it burst into flame. If he knew that this was in fact was specially prepared for burning, as it obviously was from the speed of the combustion, there was no reason for him to pour lighter fluid upon it. Further, the small amount of lighter fluid involved, would not have created this large a blaze. Therefore, one other factor indicating his lack of knowledge.

All crimes require a consciousness of criminal behavior and it is necessary that one know that he is committing a crime in order to be punished for that crime. The evidence that was adduced herein there was no showing of knowledge on the part of the defendants and more specifically, the defendant, Kandle. Therefore, the defendants pray that this court make and enter an order finding that the government did not sufficiently prove their case and that their convictions be reversed and they be discharged.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BELL, HARRIS, KIRKSEY
& THOMAS

ALLEN I. HARRIS
3920 Lindell
St. Louis, Missouri 63108
533-1776

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 80-1276

Appeal from the United States District Court
for the Eastern District of Missouri

United States Of America,
Plaintiff-Appellee,

v.

Richard Lane Bangert,
And
Alan Harold Kandel,
Defendants-Appellants.

Submitted: September 12, 1980

Filed: April 1, 1981

Before HENLEY, MC MILLIAN, Circuit Judges, and BECKER, Senior District Judge*

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* The Honorable William H. Becker, United States Senior District Judge for the Western District of Missouri, sitting by designation.

BECKER, Senior District Judge

Appellant Richard Lane Bangert (Bangert) appeals from judgments of conviction and sentences based on jury verdicts finding Bangert guilty, as charged in Count I, of violating § 641, Title 18 U.S.C. (stealing government property valued at less than one hundred dollars), and guilty, as charged in Count II, of violating § 1361, Title 18 U.S.C. (destruction of government property valued at less than one hundred dollars).

On Count I, Bangert was sentenced by the court to imprisonment for six months and a fine of one thousand dollars was imposed. On Count II, Bangert was sentenced to imprisonment for one year and a fine of one thousand dollars was imposed. Bangert was ordered to serve these two sentences of imprisonment consecutively.

Appellant Alan Harold Kandel (Kandel) appeals from a judgment of conviction and sentence based on a jury verdict finding him guilty, as charged in Count II only, of violating § 1361, Title 18 U.S.C. (destruction of government property valued at less than one hundred dollars). On Count II, Kandel was sentenced by the court to imprisonment for one year and a fine of one thousand dollars was imposed.

The appellants were charged in a single indictment, and tried jointly on Count II.

The Assignments Of Error Of Appellant Bangert

Appellant Bangert contends that the district court erred: (1) in allowing the witnesses to identify Bangert in court at trial, contending that the earlier out-of-court identification procedures used by the Federal Bureau of Investigation (FBI) before indictment were impermissibly suggestive, causing the in-court identifications of him to be tainted by the earlier out-of-court identification of him from a display of photographs; (2) in not granting the motion of Bangert for a directed verdict, contending that the evidence was insufficient to sustain a verdict of guilty on Count II of the indictment; (3) in not granting a mistrial or continuance because of the contention of both defendants that they were greatly prejudiced by publicity unconnected with the defendants that inflamed the nation and the jury panel; (4) in abusing its discretion by imposing excessive sentences; (5) in sentencing Bangert to two terms of imprisonment to run consecutively; and (6) imposing the sentences of

such severity for political acts that exercise of basic constitutional rights was chilled and others deterred from taking political stands opposing policies of the government.

The Assignments Of Error Of Appellant Kandel

Appellant Kandel contends that the district court erred: (1) in not granting the motion of Kandel for a directed verdict, contending that the evidence was insufficient to sustain a verdict of guilty on Count II of the indictment; (2) in not granting a mistrial or a continuance because of the defendants' contentions that they were greatly prejudiced by publicity unconnected with the defendants that inflamed the nation and the jury panel; (3) in abusing its discretion by imposing an excessive sentence; and (4) when imposing sentence, in considering impermissible criteria, which infringed upon Kandel's basic constitutional rights as claimed by Bangert above.

For the reasons stated hereinafter, we affirm the judgments and sentences of the district court.

The Factual Background Shown By The Evidence

In the following discussions the evidence and reasonable inferences therefrom are reviewed in the light most favorable to the prosecution, in accordance with the principles enunciated in *Glasser* v. *United States,* 315 U.S. 60, 80, 62, S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942); *United States* v. *Barry* (C.A.8 1979) 599 F.2d 267, *cert. denied,* 444 U.S. 862, 100 S.Ct. 129, 62 L.Ed.2d 84 (1979).

On November 27, 1979, at approximately 7:50 A.M., a United States flag was stolen from the flagpole of the Federal Building at 1520 Market Street in St. Louis. (Tr. 70). The flag was replaced with a banner on which appeared a slogan that read "U. S. Keep Your Bloody Hands Off Iran." (Tr. 70). Approximately four hours later a United States flag was burned at a demonstration on the campus of Washington University, in

which Bangert and Kandel participated. (Tr. 168, 254, 285). Apparently, the purpose of the demonstration was to protest involvement of the United States in the internal affairs of Iran. (Tr. 261, 293-294). Banners, with the same slogan that appeared on the banner that replaced the United States flag taken from the Federal Building, were displayed at the demonstration on the campus. (Tr. 261, 279, 294).

On February 1, 1980, Bangert was arrested by FBI agents on charges of the theft and destruction of the United States flag owned by the United States government that had been taken from the Federal Building. (Tr. 222). On the same day, Kandel was arrested by FBI agents on a charge of destruction of the United States flag owned by the United States government that had been taken from the Federal Building. (Tr. 242).

A. Pre-Trial Proceedings

On March 10, 1980, prior to trial, Bangert filed a Motion to Suppress Identification in the district court. The motion urged the district court judge to suppress the out-of-court identifications of him previously made, and also any later in-court identifications, on the grounds that the identification procedures before indictment were suggestive and improper and would therefore taint any later identifications. (Record on Appeal, 4-5). A pretrial evidentiary hearing was held on the Motion to Suppress Identification at which Julian Stackhaus, an FBI agent, and three eyewitnesses to the theft of the United States flag, Michelle Ownes, John McHale, and Roland Reeves testified. (Tr. 2-32).

Julian Stackhaus testified at the pretrial hearing that he was the FBI investigating officer in the case involving the theft of a United States flag from the Federal Building in St. Louis (Tr. 4); that, as part of the investigation, he interviewed Michelle Owens, John McHale, and Roland Reeves, eyewitnesses to the theft of the United States flag (Tr. 4); that Michelle Owens

described one of the people she observed at the Federal Building as a tall, white male with a beard (Tr. 6); that John McHale described one of the people he observed at the Federal Building as a white male, five feet eight inches tall, with a full beard, high forehead, and curly hair, wearing a green jacket, blue pants, and soft soled shoes (Tr. 12); that Roland Reeves described the person he observed at the Federal Building as a white male, five feet nine inches to five feet ten inches tall, of medium build, with a receding hairline, full beard, wearing glasses and a short-length coat (Tr. 15); that after giving the descriptions to agent Stackhaus, the eyewitnesses were shown a series of photographs, consisting of eleven photographs that included three females, two black males, and six white males, only four of whom had facial hair of any kind, and only one, that of Bangert, with a full beard (Tr. 8, 9, 13, 14, 15, 16); and, that agent Stackhaus was aware prior to showing the photographs that the person the FBI was looking for was a white male with a full beard. (Tr. 9).

Witnesses Michelle Owens, John McHale, and Roland Reeves each testified separately at the hearing that each gave a description to Stackhaus of one of the persons observed by each witness at the Federal Building on the morning of November 27, 1979 (Tr. 24, 27, 29); that each was shown a series of photographs from which each one picked out the person observed (Tr. 25, 28, 30); and, that none were told anything, prior to viewing the display of photographs, concerning the political beliefs of the individuals or whose photograph to pick out. (Tr. 25, 28, 29). These witnesses were not asked to identify anyone in court at the hearing on the Motion to Suppress Identification.

Following this testimony, the district court ruled that the display of photographs used in the identifications procedures was not impermissibly suggestive; that the inclusion of the photographs of the black males and the females did not create a substantial likelihood of improper suggestions made by the FBI agent to the witnesses while showing the photographs; that there

was no evidence of tainting but that this finding could be reconsidered during the trial. (Tr. 31-32). Then, the district court denied the Motion to Suppress Identification of the defendant Bangert. (Tr. 32).

B. Additional Evidence At The Trial

At the trial, the three eyewitnesses to the taking of the United States flag, Michelle Owens, John McHale, and Roland Reeves, were called by the prosecution as witnesses. Owens and Reeves testified to observing the lowering of the United States flag, and the substitution of the banner on the flagpole in front of the Federal Building. (Tr. 78, 107). McHale testified that he saw Bangert run through a nearby parking lot with a black plastic trash bag containing something. (Tr. 124-127, 134-137). After giving descriptions to police of the person these witnesses saw at the Federal Building, each then identified Bangert from a display of photographs as one of the individuals engaged in taking the United States flag. (Tr. 184, 111, 128, 221). Reeves and Owens each testified to observing the United States flag coming down from the flagpole in front of the Federal Building. (Tr. 79, 56, 107, 112, 120). Owens testified that she was only a few inches away from Bangert on the building steps and looked directly into his face for about a minute, saw him take the United States flag, put it into a black plastic trashbag, and run off with the black trashbag containing the United States flag. (Tr. 107-109, 121). Reeves testified that he was in his car at Market and 15th Street; that shortly after he saw three people lower the United States flag, he saw Bangert run alongside the Federal Building, carrying a black plastic trashbag (Tr. 79-81); that he followed Bangert to a car, saw Bangert open the car door, put the black plastic trashbag in the car, and drive the car away (Tr. 79-81); that the car he saw Bangert get into was a rust-colored 1977 or 1978 model car, with a license plate number BEB-731 or 371. (Tr. 81-82, 91-92). McHale testified that he saw Bangert run past him, carrying a black plastic trashbag that

appeared to contain something (Tr. 124-127). Each of these three witnesses separately stated that while on the way to work in the morning on November 27, 1979, each observed Bangert at or near the Federal Building. (Tr. 78, 107, 124). On November 30, 1979, Owens gave a description to an agent of the FBI stating that the man she observed was white, with a curly beard, mustache, glasses, a black leather jacket and jeans. (Tr. 115-116). Reeves described the man he observed to the agent of the FBI on November 27, stating that the man was white, five feet nine inches to five feet ten inches tall, of medium build, with a full beard, a receding hairline, and a short-length coat. (Tr. 226). McHale, when interviewed by an agent of the FBI on November 27, described the man he observed as white, five feet eight inches tall, wearing glasses, with a receding hairline, curly hair, a full beard, wearing a green Army-type jacket, blue pants, and softsoled shoes. (Tr. 234). Each of the three witnesses again picked the photograph of Bangert out of the display of photographs, described in detail, earlier (Tr. 84, 111, 128), and each identified him in court at trial as one of the men observed at the Federal Building on November 27, 1979, when the United States flag was taken. (Tr. 83, 109, 127). Bangert was not seated at the counsel table at the time of this identification, but was seated in the first row of the spectator section. (Tr. 76). Each witness stated that the incourt identification by the witness was based on observation of the events of November 27, 1979, and recollection thereof; and that there was no doubt of the identification (Tr. 84, 111, 128). At the trial, the display of photographs was offered in evidence by the prosecution after testimony of the identifying witnesses. (Tr. 139). The photographic display was repeatedly used, without objection, by counsel for the prosecution and defense in the examination of the eyewitnesses.

Witnesses called by the prosecution traced the stolen United States flag from the time it was ordered by the General Services Administration (GSA) until it was delivered to GSA in St.

Louis. (Tr. 150, 153). Evidence was offered that the stolen flag flown on the flagpole in front of the Federal Building in St. Louis measured eight feet eleven 3/4 inches by seventeen feet (Tr. 145, 151), and was stamped at the factory with the words "G.S.A. - Property of U.S. Government". (Tr. 202, 203, 205). The witness Michael Liberman, the President of the Valley Forge Flag Company (Valley Forge), supplier of flags to the United States Government, compared the remnants of the United States flag burned at the Washington University demonstration with a new United States flag of government specifications made by Valley Forge. He testified that the remnants and the United States flag supplied by Valley Forge were identical. (Tr. 202, 203). Liberman further testified that the size and type of flag, measuring eight feet, eleven 3/4 inches by seventeen feet, was made only for GSA and was not commercially available. (Tr. 205). Chester Blythe, an expert in textile fabrics and fibers, testified that the United States flag burned at the Washington University demonstration appeared to be identical in size to the Valley Forge United States flag and that both flags were manufactured by the same company. (Tr. 218).

The witness Clarence Rippeto, an employee of the State of Missouri Department of Revenue, Bureau of Motor Vehicles, testified that a 1977 Chevrolet with license number BEB-971 is registered to Richard Bangert. (Tr. 140-141).

Defendant Bangert testified in his defense at trial. Bangert testified that he did not steal a United States flag on November 27, 1979; that he was not present at the Federal Building in St. Louis on that day (Tr. 246); that he was present that day at a demonstration at Washington University; that he arrived on the campus of Washington University around 11:00 A.M. (Tr. 247); that he met some people at Mallinckrodt Center, where he was handed a press release by a man named Sam Schor, and made photocopies of the press release; that the press release stated:

rived on the campus of Washington University at 11:30 A.M. and went to Mallinckrodt Center where he picked up a banner reading "U. S. Keep Your Bloody Hands Off Iran" (Tr. 281-282); that after about fifteen minutes, he and the group of demonstrators marched to the Quadrangle (Tr. 283); that at the Quadrangle, Kandel read a prepared speech, that was not the press release previously mentioned by Bangert; that a debate began between the demonstrators and the observers (Tr. 284); that a tug-of-war broke out over a United States flag that had been brought to the demonstration and was lying on the ground (Tr. 285); that a few minutes later, a different United States flag was removed from a plastic bag (Tr. 285); that he lit it and it burst into flames (Tr. 285); that he did not bring that United States flag to the demonstration and did not know who did (Tr. 285-286); and that he had read the news release earlier that day, but did not know that the United States flag burned at the demonstration was the same flag that was stolen from the Federal Building. (Tr. 290).

Bangert and Kandel each testified that the purpose of the demonstration at Washington University was to support the Iranian people and to oppose the role that the United States had played in Iranian affairs (Tr. 293-294, 271); that each intended to burn an American flag at the demonstration but had no intention of burning a United States flag belonging to the United States government. (Tr. 294).

Three other witnesses who testified for the defendants stated that Bangert and Kandel have reputations for truth and honesty. (Tr. 275, 277, 296.)

C. Sentencing Proceedings

During sentencing proceedings, the district judge expressed his belief that Bangert and Kandel had "lied under oath" (Tr. 358); that he did not observe any regret or remorse or repentance expressed by Bangert or Kandel. (Tr. 356-357). These fac-

tors obviously were considered by the district judge in determining the sentences of the appellants.

I.

The District Court Did Not Err In Allowing Witnesses To Identify Bangert At Trial And In Denying Motion To Suppress Because Those In-Court Identifications Were Reliable

Bangert claims that the out-of-court identification procedures of the FBI were so impermissibly suggestive that they tainted the entire trial, and therefore required the district court to suppress the out-of-court identifications. In addition, Bangert contends that because of the impermissible suggestiveness of the identification procedures, the district court erred in allowing in-court identifications because they were tainted by the earlier improper out-of-court identification procedures. (Brief of Appellants, 8-13). We disagree.

As summarized earlier, there was extensive testimony, at the hearing on the Motion to Suppress Identification and at the trial, (a) concerning descriptions given to the FBI by eyewitnesses to the taking and carrying away of the United States flag prior to viewing the display of photographs, (b) the identification of Bangert from the group of photographs by these witnesses and (c) the makeup of the display of photographs assembled by the FBI, described earlier. This display of photographs may have been suggestive. And we do not condone the use of a display containing a selection of photographs such as those used in this case. The law requires more than a suggestive out-of-court photographic display or lineup, however, to suppress an out-of-court identification and to find an in-court identification to be tainted.

An in-court identification is not tainted by a suggestive photographic display "if a sufficient basis for courtroom iden-

tification independent of any improper photo display exists." *U.S.* v. *Mears* (C.A.8 1980), 614 F.2d 1175, 1177. Moreover, the issue to be addressed is the question of likelihood of misidentification, not solely the suggestiveness of the procedures used. *Neil* v. *Biggers,* 409 U.S. 188, 198-199, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401, 411 (1972); *Manson* v. *Brathwaite,* 432 U.S. 98, 87 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Bivens* v. *Wyrick* (C.A.8 1981), ____ F.2d ____, No. 80-1670, February 18, 1981; *Sanders* v. *Wyrick* (C.A.8 1981), ____ F.2d ____, No. 80-1711, February 18, 1981.

The criteria to be considered in ruling on the question of tainting by out-of-court photographic identifications have been clearly established by a number of controlling Supreme Court decisions. *See U.S.* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Stoval* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Simmons* v. *U. S.,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1967); *Neil* v. *Biggers, supra,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson* v. *Brathwaite, supra,* 432 U.S. 98, 87 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The Supreme Court has held that convictions after trial following earlier out-of-court identification will be set aside only on a showing that the earlier out-of-court photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *U.S., supra,* 390 U.S. at 384, 88 S.Ct. at 971, 19 L.Ed.2d at 1253 (1967). The factors to be considered in evaluating the likelihood of misidentification, and hence the reliability of the identification, have been enumerated by the Supreme Court and followed by this circuit. *Neil* v. *Biggers, supra,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *United States* v. *Anderson* (C.A.8 1980), 618 F.2d 487; *United States* v. *Smith* (C.A.8 1979), 602 F.2d 834. These include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty

demonstrated by the witness at the [identification], and the length of time between the crime and the [identification]." *Neil* v. *Biggers, supra,* 409 U.S. at 199-200, 93 S.Ct. at 382, 34 L.Ed.2d at 411 (1972). *See also Manson* v. *Brathwaite, supra,* 432 U.S. 98, 87 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Applying these principles to the facts of this case, it is concluded that the in-court and out-of-court identifications were reliable with no likelihood of irreparable misidentification, despite the suggestiveness of the photographic display. Each eyewitness had ample opportunity to see the defendant Bangert in action on November 27, 1981. Owens was only a few inches away and looked right into his face for about a minute, (Tr. 108); Reeves, while driving his car, followed Bangert from the Federal Building to Bangert's car (Tr. 79); and McHale was standing close to the path of the defendant Bangert and was able to observe him for 10 or 15 seconds, as he ran by. (Tr. 135). Each eyewitness testified to paying close attention to the defendant Bangert because the events of the norming were unusual. Each eyewitness gave detailed descriptions to the FBI and identified Bangert, out-of-court and in-court, with certainty. Each testified that the identification was based on clear observations on November 27, 1979. Further, the time between the observed actions and the descriptions and the identifications given to the FBI was short; Reeves and McHale gave their descriptions to the FBI on November 27, 1979, the day of the observed actions; Owens gave her description to the FBI on November 30, 1979. (Tr. 78, 115, 226). Based upon these facts, we conclude that the trial judge was warranted in finding that the identifications of Bangert by the eyewitnesses were reliable. Therefore, the district court did not err in refusing to suppress the out-of-court identifications or in allowing the in-court identifications of Bangert.

II.

The Evidence Was Sufficient To Sustain A Verdict Of Guilty

The appellants, Bangert and Kandel, contend that the evidence at trial was insufficient to prove that the appellants burned a United States flag belonging to the United States government, or that they knew that the flag they burned belonged to the United Statse as charged in Count II (Brief of Appellants, 14, 16).

In order to convict the defendants on Count II, destruction of property of the United States, it was necessary for the prosecution to prove by the evidence beyond a reasonable doubt that the flag that was burned was owned by the government; that there was actual damage done to the flag; and that the defendants burned the flag with knowledge that they were violating the law. *See: United States* v. *Briddle* (C.A.8 1971), 443 F.2d 443, *cert. denied,* 404 U.S. 942, 92 S.Ct. 291, 30 L.Ed.2d 256; *United States* v. *Beneke* (C.A.8 1971), 449 F.2d 1259. But, in a criminal prosecution when it is necessary for the prosecution to prove the existence of a particular state of mind or intent on the part of the defendants, the proof may be made by circumstantial evidence. *United State* v. *Hicks* (C.A.8 1980), 619 F.2d 752.

In this case, there was substantial evidence in the record to support the findings of the jury of ownership of the burned flag by the United States, and damage to that United States flag. Further, there was substantial evidence from which the jury could infer that the defendants knew the flag they burned was a flag owned by the United States government. The prosecution produced several witnesses to identify and trace the United States flags produced for GSA of the United States, and to prove that the stolen United States flag, owned by the United States, was burned at the Washington University demonstration by the defendants acting in concert.

It is clear that the prosecution presented substantial evidence to support the verdicts of the jury. The jury weighed all of the evidence and found beyond a reasonable doubt that the flag that was burned was owned by the United States, and that both defendants had knowledge that it was a flag owned by the United States. Therefore, we conclude that neither of the convictions of appellants on Count II should be set aside because of insufficiency of the evidence.

III.

All Appropriate And Necessary Precautions Were Taken By The District Court To Ensure Defendants A Fair Trial

The defendants contend that the district court erred in not granting a mistrial or a continuance because of undue publicity, unconnected with the defendants which, they contend, inflamed the nation and the jury. (Brief of Appellants, 19). We conclude that the district court took all appropriate and necessary precautions to ensure that the defendants were given a fair trial free from prejudice and influence from prejudicial publicity.

At the time of the trial, March 10, 1980, news coverage of the hostages in Iran, unconnected to the defendants or their trial, continued to be featured in the news media. Because the defendants had openly expressed their sentiments concerning United States involvement with Iran, in the demonstration in which they and their associates participated, and in the display of the banners at the demonstration, the defendants contend that the jury was so prejudiced as to deprive them of a fair trial. (Brief of Appellants, 19, 21; Tr. 138). We disagree.

It is well established that the defendants have a right to a fair trial by an impartial jury free from outside influences, including potentially prejudicial news media reports of events connected with the matter on trial. *Sheppard* v. *Maxwell,* 384 U.S. 333, 86

S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Irvin* v. *Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Supreme Court has suggested several preventive and protective precautions when it appears that there is a reasonable likelihood that prejudicial news dissemination prior to trial will prevent a fair trial. The preventive and protective procedures include: continuance of the trial to a later date when publicity has subsided; changing venue; conducting intensive and extensive *voir dire* of the jury panel; and sequestering the jury. *Sheppard* v. *Maxwell, supra,* 384 U.S. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620 (1966).

In this case, the defendants did not ask for a continuance or a change of venue. The record reveals that, while the jury was not sequestered or sequestration requested, an intensive *voir dire* examination of the jury panel was conducted. (Tr. 34-60). Further, the jury was instructed several times not to read any newspapers, listen to the radio, or watch television. (Tr. 61-62, 66, 135-136, 198, 298-299). At the conclusion of the trial, the court read an instruction requested by defense counsel which directed the jury to disregard any issues relating to foreign policy or events in the news. (Tr. 346). During trial, defense counsel did, however, request a mistrial because of intensive news coverage of the events in Iran. (Tr. 138-139). The district court refused to grant the requested mistrial, noting that the jury had been repeatedly admonished not to read the newspapers or listen to the news and adequately questioned on *voir dire.* The district judge also noted that he would later thoroughly instruct the jury to consider only the evidence at trial. (Tr. 138-139).

This case does not involve a claim of specific prejudicial pretrial publicity about the defendants but, rather, a general claim of prejudicial publicity of world events during trial. The publicity complained of did not concern the defendants or their trial. The only possible connection between the publicity of world events and the defendants was the subject of relations between the United States and Iran, publicity which was initiated by the defendants in the context of world events.

The district court determined that sufficient precautions had been taken to ensure a fair trial to defendants, and reliably found that the publicity in question did not constitute prejudicial publicity in this case. (Tr. 138-139). In such circumstances, the finding of the trial judge should be accorded deference for he "has large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial." *United States* v. *Williams* (C.A.8 1979), 604 F.2d 1102, 1114. We conclude that the district court did not abuse its discretion in refusing to grant a mistrial or to initiate a continuance in this case.

IV.

The District Court Did Not Impose Excessive Sentences

Defendants contend that the district court abused its discretion by imposing excessive sentences in this case. (Brief of Appellants, 22). Section 641, Title 18 U.S.C., under which defendant Bangert was changed in Cout I, provides that when the value of the property stolen is less than one hundred dollars, the guilty party shall be fined not more than one thousand dollars, imprisoned not more than one year, or both. Section 1361, Title 18 U.S.C., under which both defendants were sentenced in Count II states that when the value of the property destroyed is not more than one hundred dollars, the sentence imposed shall be by a fine of not more than one thousand dollars, or imprisonment for not more than one year, or both.

On Count I, Bangert was sentenced to imprisonment for six months and a fine of one thousand dollars was imposed. On Count II, both defendants were sentenced to imprisonment for one year and a fine of one thousand dollars was imposed.

The Supreme Court of the United States has held that in the absence of exceptional circumstances, not present in this case,

"a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." *United States* v. *Tucker,* 404 U.S. 443, 447; 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). This is also the controlling rule in this circuit and dispositive of the issue in this case. *United States* v. *Moss* (C.A.8 1979), 591 F.2d 428; *Woosley* v. *United States* (C.A.8 1973), 478 F.2d F.2d 139. In this case, conviction on each Count authorized a maximum possible sentence of one year imprisonment and imposition of a fine of one thousand dollars. Defendants' sentences were within the statutory limits.

We, therefore, conclude that because the sentences did not exceed statutory limits, and were not excessive in the circumstances, the sentences were lawfully imposed. The only proceeding, available after final judgment, to request the reduction of a lawful sentence is a motion for reduction of sentence under Rule 35, F.R.Cr.P.

V.

Imposition Of Consecutive Sentences Was Appropriate In This Case

Appellant Bangert contends that the district court erred in imposing consecutive sentences for the two offenses of which he was convicted. (Brief of Appellants, 25). Bangert further argues that the two offenses constitute one continuous incident, thus requiring that he not be punished twice without a clear indication from Congress that it authorizes such a result. (Brief of Appellants, 25-28).

It is correct that Congress has by law proscribed cumulative punishments for offenses arising under the same statute which exceed the maximum set by the statute. *United States* v. *Jones* (C.A.9 1973), 487 F.2d 676; *United States* v. *Ackerson* (C.A.8 1974), 502 F.2d 300. However, "there is no constitutional impediment to Congress' authorizing cumulative sentences for a

single act that may violate more than one statute when the offenses created by the statute are not identical." *United States* v. *Clements* (C.A.9 1972), 471 F.2d 1253, 1254; *United States* v. *Jones, supra,* 487 F.2d 676.

Furthermore, "Congress has the power to establish that a single act constitutes more than one offense, at least as long as each offense requires proof of a fact the other does not." *United States* v. *Jones, supra,* 502 F.2d at 679. Imposition of cumulative sentences in such circumstances has been approved consistently by the Supreme Court. The Supreme Court stated in *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932) and reasserted in *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980) and *Albernaz* v. *United States,* ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1981) No. 79-1709, March 9, 1981, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." This test is used "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." So, if the act or transaction is punishable under two separate statutes and requires proof of two sets of facts, cumulative sentencing is appropriate. This rule is followed by this circuit. *Brinkley* v. *United States* (C.A.8 1977), 560 F.2d 871.

In this case, the offenses for which Bangert was convicted were not only contained in different statutes but they required proof of different elements of ultimate facts to sustain a conviction under each Count. To prove a violation of § 641, Title 18 U.S.C., the prosecution had to prove that the defendant intended to and did steal the property of the United States having a value of less than one hundred dollars. To prove a violation of § 1361, Title 18 U.S.C., the prosecution had to prove that the defendant

intended to, and did destroy property of the United States having a value of less than one hundred dollars. It is clear that the material elements of these two offenses are different.

We therefore conclude that whether the offenses for which Bangert was convicted were parts of one or more continuous transactions, they were punishable under two separate statutes, requiring proof of different material facts. Therefore, the imposition of consecutive sentences was appropriate.

VI.

The District Court Did Not Consider Impermissible Factors In Determining Defendants' Sentences

While *amicus curiae* cannot independently assign error, we will comment on the contentions of *amicus curiae,* the American Civil Liberties Union of Eastern Missouri, that fall within general contentions of the appellants. *Amicus curiae* contends that the district court considered impermissible factors in determining defendants' sentences, infringing on their Fifth and First Amendment rights. (Brief of *Amicus Curiae,* 3). Specifically, *amicus curiae* claims that the judge's consideration of his belief that the defendants lied at trial was impermissible; that consideration of defendants' lack of remorse violates defendants' Fifth Amendment rights against self-incrimination; and that the nature of the crime itself requires caution in sentencing to ensure no infringement upon defendants' First Amendment rights to express political beliefs. (Brief of *Amicus Curiae,* 4-6).

At the outset, we note that the district judge took special care to make it clear that he was not sentencing the defendants because of their political beliefs or political activities. (Tr. 357-358). The district judge specifically stated:

> "[M]y sentence in this matter has nothing to do with your political beliefs or your membership in whatever organizations you belong to or the fact that you were expressing yourselves in a peaceful demonstration.... And you are surely not being sentenced because of Mr. Bangert's, at least, feeling about the Vietnam War, because certainly any thinking person, from time to time, has doubts about actions that may have been taken." (Tr. 357-358).

Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendants' sentences, because it would impair the rights of the defendants under the First Amendment, protecting public expression of their political beliefs, by words and symbols. *Spence* v. *Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); *Street* v. *New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). We find, however, that these sentences did not impair rights of the defendants guaranteed by the First Amendment.

The district judge did consider other matters in determining defendants' sentences. The district judge stated:

> "I do think, I'd observe that the jury believed, and I agree with them, that you are both liars, and in that regard, I believe you lied under oath.... It's one thing to violate the law and to accept responsibility for it.... It's a little different thing to flaunt the violation and then to lie about it under oath." (Tr. 358-359).

Further, the district judge stated:

> "I don't observe any regret, remorse, whatever we might call it.... I would expect to find a little something and I find nothing in that area from these gentlemen." (Tr. 356-357).

Amicus curiae contends that these comments are based on impermissible factors, infringing upon defendants' Fifth Amend-

ment rights against self-incrimination. (Brief of *Amicus Curiae*, 4). We disagree.

The Supreme Court in *United States* v. *Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978), held that it is permissible for a judge in imposing sentence to consider his belief that a defendant lied at trial. In that case the Supreme Court stated that the truthfulness of a defendant, while testifying in his own behalf is probative of his prospects for rehabilitiation, and relevant to sentencing. *United States* v. *Grayson, supra*, 438 U.S. at 50, 98 S.Ct. at 2616, 57 L.Ed.2d at 590. The Supreme Court reasoned that it is necessary to consider in sentencing the whole person and personality of a defendant, as manifested by his conduct at trial, and his testimony under oath may shed light on the sentencing decision. *United States* v. *Grayson, supra*, 438 U.S. at 53, 98 S.Ct. at 2617, 57 L.Ed.2d at 591. In that case consideration by the district judge of the truthfulness of the testimony of each defendant in imposing sentences was held to be permissible.

For the same reason it was permissible for the district judge to consider lack of truthfulness and lack of remorse of the defendants in deciding their sentences. The district judge has wide discretion in determining, within statutory limits, what sentences to impose and may appropriately conduct a broad inquiry largely unlimited in the kind of information he may consider. *United States* v. *Grayson, supra*, 438 U.S. at 50, 98 S.Ct. at 2615-2616, 57 L.Ed.2d at 590; *United States* v. *Tucker, supra*, 404 U.S. at 446, 92 S.Ct. at 591, 30 L.Ed.2d at 596. These propositions have been enunciated by several courts as authority for holding that comments by the sentencing judge pertaining to lack of remorse do not indicate an impermissible intent on the part of the judge to penalize the defendant for assertion of his Fifth Amendment rights. *United States* v. *Miller* (C.A.1 1978), 589 F.2d 1117; *United States* v. *Richardson* (C.A.5 1978), 582 F.2d 968; *United States* v. *Allen* (C.A.7 1980), 596 F.2d 227, *cert. denied*, 444 U.S. 871, 100 S.Ct. 149, 62 L.Ed.2d 97 (1980).

We find no error in the imposition of the sentences upon appellants.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT